

SERVICE DATE – DECEMBER 4, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35943

MASSACHUSETTS DEPARTMENT OF TRANSPORTATION—ACQUISITION  
EXEMPTION—CERTAIN ASSETS OF PAN AM SOUTHERN LLC

Digest:<sup>1</sup> The Massachusetts Department of Transportation (MassDOT) does not need Board authorization to acquire certain physical assets of Pan Am Southern LLC (PAS) in Massachusetts. PAS would retain the legal obligation to provide freight rail service, and MassDOT would not be able to unreasonably interfere with that service.

Decided: December 3, 2015

The Board is granting the motion of the Massachusetts Department of Transportation (MassDOT), a Class III carrier,<sup>2</sup> to dismiss its notice of exemption filed in this proceeding to acquire certain physical assets from Pan Am Southern LLC (PAS). We find that 49 U.S.C. § 10902 does not apply to this sale of physical assets and associated rail right-of-way, because the selling carrier would retain an exclusive, perpetual freight rail easement over the rail line together with the common carrier obligation, and the purchaser could not unduly interfere with the provision of freight rail service on the line.

BACKGROUND

On August 14, 2015, MassDOT filed a verified notice of exemption under 49 C.F.R. § 1150.41 to acquire from PAS certain railroad assets and associated right-of-way, known generally as the Adams Branch, extending from Engineering Station 739+20 in Adams, Mass., to Engineering Station 981+45 in North Adams, Mass. (the Railroad Assets), a distance of

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> MassDOT became a common carrier by virtue of its 2015 acquisition of interstate passenger rights from Housatonic Railroad Company, Inc. See Mass. Dep't of Transp.—Acquis. & Operation Exemption—Certain Assets of Housatonic R.R. (Housatonic), FD 35866, slip op. at 5 (STB served May 22, 2015). Specifically, MassDOT obtained interstate passenger rights over the “Berkshire Line,” from approximately milepost 50.0 at the Massachusetts-Connecticut border at Sheffield, Mass., to a connection with CSX Transportation, Inc., at approximately milepost 86.3 at Pittsfield, Mass.

approximately 4.6 miles.<sup>3</sup> MassDOT simultaneously filed a motion to dismiss the notice, asserting that the transaction does not require Board authorization because MassDOT would acquire neither the right nor the ability to provide railroad common carrier service over the Railroad Assets, and it would be contractually precluded from interfering with PAS's operations. MassDOT also submitted several letters of support and requests for expedited handling.<sup>4</sup> On November 16, 2015, MassDOT amended its motion to dismiss, requesting that the Board issue a decision on the merits no later than December 4, 2015, rather than the original date of December 15, 2015.

MassDOT states that its acquisition of the Railroad Assets is intended to facilitate the Commonwealth's economic development plans by: (1) signaling to existing and prospective freight customers that the Adams Branch will remain a viable freight transportation resource in the future by virtue of state ownership; (2) promoting the Adams Branch as a Commonwealth-supported transportation resource; and (3) developing local business by installing on the Railroad Assets a passenger excursion operation (known as the Berkshire Scenic Railway) that will promote the Adams Branch as an important cultural asset in western Massachusetts, attracting increased tourism and tourist revenue to the region. (Mot. to Dismiss 5.)

MassDOT proposes to acquire from PAS the physical assets and right-of-way of the Adams Branch, subject to PAS's retention of an exclusive, perpetual easement and obligation to provide common carrier freight rail service on the Railroad Assets. Under the 2015 Operating Agreement between MassDOT and PAS (Operating Agreement), PAS would be responsible for maintaining the Rail Operating Property<sup>5</sup> in accordance with FRA Class I track safety standards. (Mot. to Dismiss 13.) Either party could have the Rail Operating Property maintained at a higher level at that party's expense. *Id.* The Operating Agreement also provides that PAS would continue to dispatch operations over the Rail Operating Property. (Mot. to Dismiss 28.)

The Operating Agreement would establish two operating windows for freight and excursion passenger service over the Railroad Assets. First, it provides a freight operating window granting PAS exclusive access to the Rail Operating Property between each Monday at 02:00 and each Friday at 14:00, E.S.T., with the exception of between 00:01 and 24:00, E.S.T.

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<sup>3</sup> Notice of the exemption was served and published in the Federal Register on August 28, 2015 (80 Fed. Reg. 52,364).

<sup>4</sup> The Board has received letters of support from U.S. Senator Elizabeth Warren, Massachusetts State Senator Benjamin B. Downing, North Adams Mayor Richard J. Alcombright, Adams Town Administrator Tony Mazzucco, and the president of the Berkshire Scenic Railway Museum, Jay R. Green. On October 26, 2015, MassDOT submitted a joint letter from North Adams Mayor Alcombright and Town Administrator Mazzucco requesting that the Board grant the relief requested by MassDOT as soon as possible.

<sup>5</sup> The parties use the term "Rail Operating Property" to describe the portion of the Railroad Assets devoted specifically to train operations, as distinguished from the portion of the Railroad Assets used exclusively to support excursion operations or not otherwise directly involved in the provision of actual freight rail service.

on federal holidays recognized by PAS's collective bargaining agreements (Holidays). Except on Holidays, PAS could use the Rail Operating Property during the week to operate as many freight trains as it deems reasonable or necessary. Second, the Operating Agreement provides an excursion operating window granting MassDOT exclusive access to the Rail Operating Property to provide excursion passenger service between each Friday at 14:00 and each Monday at 2:00, E.S.T., as well as between 00:01 and 24:00 E.S.T. on Holidays. (Mot. to Dismiss 28-29.)

## DISCUSSION AND CONCLUSIONS

The issue here is whether Board authorization is required for MassDOT to acquire the Railroad Assets if PAS retains an exclusive, perpetual, and irrevocable easement to conduct common carrier freight rail operations under the terms of the relevant agreements.

The acquisition of an active rail line and the common carrier obligation that goes with it ordinarily requires Board approval. When the carrier selling a rail line retains an exclusive permanent easement to provide common carrier freight service and has sufficient control over the line to carry out its common carrier obligation, the Board typically has found that authorization is not required and that ownership of the line remains with the selling carrier for purposes of § 10901(a)(4). See Me. Dep't of Transp.—Acquis. & Operation Exemption—Me. Cent. R.R. (State of Maine), 8 I.C.C.2d 835, 836-37 (1991); Mich. Dep't of Transp.—Acquis. Exemption—Certain Assets of Norfolk S. Ry., FD 35606, slip op. at 3 (STB served May 8, 2012); Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op. at 6 (STB served May 3, 2010), aff'd sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011). See also Cent. Puget Sound Reg'l Transit Auth.—Acquis. Exemption—Certain Assets of City of Tacoma in Pierce Cty., Wash., FD 35812 (STB served Feb. 5, 2015 (holding that ownership of “the line” can refer to a permanent, exclusive freight rail easement and sufficient control over its operation to carry out the common carrier obligation without undue interference, not to ownership of the physical railroad property itself.) For a transaction to fall within this exception, however, the terms of the sale must protect the selling carrier from undue interference by the purchaser or third-party designee with the carrier's common carrier freight rail service.

As a preliminary matter, the Board must address whether MassDOT, having obtained common carrier authority in Housatonic, may acquire an additional line as a noncarrier under the State of Maine line of cases. State of Maine cases typically involve state or local government organizations that are not carriers. But in a few instances, the Board has applied the doctrine to transactions where an acquiring state entity already had the status of a carrier on another railroad line. See Dallas Area Rapid Transit—Acquis. Exemption—Certain Assets of Reg'l Rail Right of Way Co. (DART State of Maine), FD 34346 (STB served Nov. 12, 2003) (granting State of Maine motion to dismiss). Dallas Area Rapid Transit (DART), a political subdivision of the State of Texas, was designated a carrier in 1988 when it acquired 34 miles of rail line in Texas from Southern Pacific Transportation Company (SP). Dallas Area Rapid Transit—Acquis. Exemption—Rail Lines of S. Pac. Transp. Co., FD 31267 (ICC served May 20, 1988) (notice of exemption to acquire and operate railroad lines in Dallas and Collins Counties, Tex.). The Board later noted that “[t]his exemption permitted DART to provide passenger service; SP retained trackage rights to continue providing freight service.” Dallas Area Rapid Transit—Acquis. &

Operation Exemption—Rail Lines of Mo. Pac. R.R., FD 31690 (ICC served July 17, 1990). DART remained a rail carrier subject to the Board’s jurisdiction as a result of this and subsequent acquisition exemptions. See, e.g., Dallas Area Rapid Transit—Acquis. Exemption—Certain Lines of Atchison, Topeka & Santa Fe Ry., FD 32511 (STB served March 17, 1995 (“DART is also a rail carrier subject to our jurisdiction by virtue of acquiring through previous exemptions certain rail lines of [Southern Pacific Transportation Co.] and the Missouri Pacific Railroad Company.”); Dallas Area Rapid Transit—Acquis. Exemption—Lines of Union Pac. R.R., FD 34063 (STB served July 20, 2001) (notice of exemption to acquire railroad lines in Collin, Dallas, Denton, Grayson and Rockwall Counties, Tex.).

Another example involved Regional Transportation District (RTD), a political subdivision of the State of Colorado. RTD became a rail carrier when it acquired a rail line in Jefferson County, Colo, from BNSF Railway Company (BNSF). Reg’l Transp. Dist.—Acquis. Exemption—BNSF Ry. in Jefferson Cty., Colo., FD 35358 (STB served Mar. 19, 2010). The transaction by which RTD became a rail carrier provided only for RTD to perform passenger rail operations, and BNSF (the freight rail carrier) retained the exclusive right to operate freight service on the line. RTD stated its intention in 2010 to file a motion to dismiss the notice in Docket No. FD 35358, but it never filed such a motion. Subsequently, RTD pursued another transaction, in which the Board granted a State of Maine motion to dismiss. Reg’l Transp. Dist.—Acquis. Exemption—Union Pac. R.R. (RTD State of Maine), FD 35394 (STB served Dec. 21, 2010).

We conclude that it is appropriate to grant MassDOT’s State of Maine motion to dismiss. Like DART and RTD, MassDOT is a state entity and became a licensed rail carrier only by acquiring rights to provide passenger service, while obtaining no freight rights.<sup>6</sup> Here, MassDOT states that the Adams Branch is a low-density track segment with only modest freight traffic, and that its continued existence and its role in promoting local industry are of critical importance to the state. (Mot. to Dismiss 8.) For example, MassDOT points out that one user of the Adams Branch is Specialty Minerals Inc., the largest employer in the Town of Adams. MassDOT emphasizes that preserving rail service on this line is important for regional economic development. Accordingly, we find that MassDOT’s status as a common carrier for the passenger rights it received in Housatonic does not preclude the application of the State of Maine doctrine here.

Having determined that MassDOT may invoke the State of Maine line of cases for the transaction here, we next look to whether PAS would retain a permanent, exclusive freight easement and would have sufficient control over the Railroad Assets to permit it to carry out its common carrier freight rail obligation.

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<sup>6</sup> We also note that MassDOT’s primary focus remains to perform essential governmental functions, rather than commercial operations. See MASS. GEN. LAWS ch. 6C, § 2 (2015). MassDOT’s acquisition of common carrier authority in Housatonic appears to be incidental to its general governmental role. (See Mot. to Dismiss 5.)

We find that the transaction, as proposed, does not require Board approval. The relevant agreements provide that MassDOT would acquire the Railroad Assets, and PAS would retain a permanent and exclusive easement to conduct freight operations on the Railroad Assets. PAS would not transfer its common carrier obligation to MassDOT, and MassDOT would not hold itself out as a common carrier performing freight rail service on the Railroad Assets.

We are satisfied that the freight rail easement retained by PAS would be permanent because, under the controlling agreements, freight rail service would terminate only if PAS were to obtain regulatory authority to abandon or discontinue service over any portion of the Railroad Assets. (Mot. to Dismiss 23.) The easement preserves PAS's common carrier rights and obligations unless and until the Board approves a modification of that easement.

The relevant agreements do not otherwise impede PAS's continuation of common carrier freight rail service. The Operating Agreement sets forth operating windows during which PAS would have the exclusive right to use the Rail Operating Property.<sup>7</sup> The Board has found that agreements that restrict freight rail operations to specific times in order to accommodate passenger service are permissible. See Fla. Dep't of Transp.—Pet. for Declaratory Order—Rail Line of CSX Transp., Inc., Between Riviera Beach & Miami, Fla., FD 35783 (STB served Oct. 1, 2014). Here, proposed operations would be conducted under provisions that accommodate both freight and excursion trains. The only two shippers on the Adams Branch, Holland Company and Specialty Minerals, Inc., were served with copies of the notice of exemption and the motion to dismiss on August 14, 2015, and have not filed any comments regarding the proposed transaction. We find that the restrictions in the Operating Agreement would not result in undue interference by MassDOT with PAS's common carrier freight rail service on the Railroad Assets.

Under the Operating Agreement, PAS would be responsible for track maintenance on the Railroad Assets. The Operating Agreement also provides that PAS would continue to dispatch operations over the Railroad Assets. These maintenance and dispatching provisions, which leave the responsibility for maintenance and dispatching with the operating freight carrier, are consistent with State of Maine.

We conclude that nothing in the proposed transaction, as structured, would affect the continuing validity of PAS's exclusive, perpetual freight rail operating easement, or would otherwise permit MassDOT to interfere unduly with PAS's ability to fulfill its common carrier obligation. Therefore, the proposed transaction is consistent with State of Maine, and MassDOT's continued ownership of the Railroad Assets would not constitute acquisition of a railroad line under 49 U.S.C. § 10902 or confer common carrier status on MassDOT as to the Railroad Assets. Under these circumstances, we find that the proposed transaction does not require Board authorization under § 10902 or an exemption under § 10502.

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<sup>7</sup> The Operating Agreement provides that MassDOT and PAS can mutually agree to exceptions on an individual basis and that such agreement shall not be unreasonably withheld, conditioned, or delayed. (Mot. to Dismiss 29.)

It is ordered:

1. MassDOT's motion to dismiss the verified notice of exemption in this proceeding is granted.
2. The proceeding is dismissed.
3. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.